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In The

Supreme Court of the United States

October Term, 1972

No. 72-863

MICHAEL LEO FIORELLA, A. RICHARD FIORELLA, CLIFFORD CARLL, JOHN PORCELLO, ANTHONY PIZZUTELLI, ANGELO ALFANO, ALFRED RIVOLI, JAMES COMUNALE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Rehearing

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of Counsel.

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This memorandum is submitted to assist the Court in applying to the present case its holdings in the May 13, 1974 decisions in *United States* v. *Giordano*, U.S. , 15 Cr. L. 3033, and *United States* v. *Chavez*, U.S. , 15 Cr. L. 3050. This case comes well within the reach of *Giordano* and is readily distinguishable from *Chavez*. Therefore, the Court should grant the petition for a writ of certiorari and reverse the judgment below.

In *Giordano* this Court directed the suppression of evidence seized by way of wiretaps where the government substantially failed to follow the requirements of Title III of the Omnibus

Crime Control Law in approving application for wiretap orders In *Giordano* the wiretap application was never reviewed b either the Attorney General or his specially designated Assistan Attorney General. Rather, the Attorney General's executiv assistant reviewed the application, approved it and forwarded i to the office of the Assistant Attorney General in charge of the Criminal Division of the Justice Department. From that office the application was returned to the government field attorney with a "Will Wilson" letter authorizing the wiretap application The Wilson letter was signed not by Wilson, but by a Deputy Assistant Attorney General acting under routine orders to affix Wilson's signature to such letters in any case where approva had been given by the Office of the Attorney General.

This Court rejected the government's attempts to justify the procedures followed in *Giordano*, recognizing that:

> " . . . Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercepted procedures . . . ." (15 Cr. L. at 3040)

The Court further observed that the effect of the restraints placed upon wiretap authorization by the legislation:

> " . . . would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." (15 Cr. L. at 3040)

Thus, the Court upheld Congress' efforts to limit federal wiretapping in order to restore respectability to that investigative technique by making it constantly vulnerable to public scrutiny. These legislative pronouncements followed this Court's lead as expressed in a series of compelling decisions whose object it was to protect rights extended by the fourth amendment and basic rights to privacy.

There has never been any satisfactory showing that the Attorney General personally reviewed the present wiretap application. Nor is there sufficient proof that the Attorney General personally initialed the memorandum authorizing Will Wilson to approve the application. Rather, the government here has introduced two meager affidavits, immediately suspect because they are made by the former Attorney General's executive assistant whose unlawful acts have created this onslaught of wiretap litigation. Completely absent here is any statement made under oath by the former Attorney General himself who, it is weakly asserted, approved this application. Only John Mitchell's personal affidavit that he reviewed and approved the wiretap application was held in *United States* v. *Chavez*, *supra*, to be sufficient to remove the circumstances in that case from those in *Giordano*. It cannot be disputed that the Attorney General personally reviewed the wiretap application in the *Chavez* case. Here, however, the Attorney General was unable, although requested by petitioners, to come forward and say under oath that he had personally approved this wiretap application.

The many cases in which this wiretap application authorization issue has been litigated have revealed standard procedures followed in the Office of the Attorney General and in the Criminal Division of the Justice Department. In literally hundreds of cases initials and signatures of the Attorney General and his specially designated Assistant Attorney General were affixed to important documents where it is unquestioned that they never saw the respective applications. The failure in the present case to substantiate the claim that the Attorney General personally approved the wiretap application mandates a reversal of the lower court's judgment.[1]

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[1]For comparison purposes we have attached in Appendix A, *infra*, a photocopy of the memorandum supposedly initialed by John N. Mitchell in this case, as well as a photocopy of Mitchell's initials affixed by his executive assistant to the memorandum in the *Giordano* case, where these procedures were held insufficient.

Even assuming *arguendo* that the initials in this case we written by Mitchell, the widespread litigation involving the procedures, including *Giordano* and *Chavez*, has taught us th the former Attorney General purposely sought an image as tough "crime fighter." Toward that end he assigned to l executive assistant the task of reviewing the Title III wiret application and preparing the appropriate paperwork for a proval. Mitchell then "hurriedly" affixed his initials to t memorandum prepared by Lindenbaum without ever havi actually reviewed the application.[2] Clearly, those procedu came nowhere near the careful consideration intended Congress in Title III.

At the very least, this case should be remanded for a heari at which the authenticity of the attorney general's "initials" a the propriety of the procedures followed here can be tested in adversarial setting. *Alderman* v. *United States*, 394 U.S. 1 (1967).

Conclusion

For all of these reasons, as well as those advanced in petition for a writ of certiorari and our reply brief, the Cou order denying our petition for certiorari should be vacated, petition granted, the judgment reversed or, in the alternati the cause remanded to the district court for a hearing.

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[2] *See Time* magazine, May 27, 1974, at 57; *Newsweek* magazine, May 27, 1 at 74-75. The identical nature of these sets of initials is so obvious that at the least an adversarial hearing should be directed by this Court.

Respectfully submitted,

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